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No. 91-636

In The

Supreme Court of the United States

October Term, 1991

FORT GRATIOT SANITARY LANDFILL, INC.,
Petitioner,

v.

MICHIGAN DEPARTMENT
OF NATURAL RESOURCES, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ST. CLAIR COUNTY RESPONDENTS' BRIEF IN OPPOSITION

- AND APPENDIX -

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DATED:
December 5, 1991

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COUNTER-STATEMENT OF QUESTION PRESENTED

DOES A STATE STATUTE WHICH MANDATES COMPREHENSIVE SOLID WASTE PLANNING AND REQUIRES THAT WASTE TRANSPORTED FROM OUTSIDE A COUNTY OR STATE BE IDENTIFIED IN A COUNTY'S SOLID WASTE MANAGEMENT PLAN "DISCRIMINATE AGAINST INTERSTATE COMMERCE" WITHIN THE MEANING OF THIS COURT'S DECISIONS IN *MAINE* v *TAYLOR*, 477 U.S. 131, 138 (1986) AND *CITY OF PHILADELPHIA* v *NEW JERSEY*, 437 U.S. 617, 624 (1978), WITH THE RESULT THAT THE STATE MUST SUSTAIN THE BURDEN OF DEMONSTRATING THAT SUCH STATUTE SERVES A LEGITIMATE LOCAL PURPOSE WHICH COULD NOT BE SERVED AS WELL BY AVAILABLE NONDISCRIMINATORY MEANS?

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COUNTER-STATEMENT OF THE CASE

Michigan's Solid Waste Management Act, Mich. Comp. Laws Ann. §§ 299.401 *et seq.*, is a comprehensive statute created to achieve the state and federal goal of long term planning for the disposal of solid waste in an environmentally sound manner. The Act *does not* prohibit "the disposal within a county in the state of any solid waste which has been generated outside the county" as the Petitioner claims (Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, Question Presented). Rather the Act, by way of two amendments adopted in 1988, merely requires that all waste generated outside of a county must be included in the county's Solid Waste Management Plan prior to

its importation and disposal. Petitioner has never alleged that the State of Michigan does not accept waste generated outside of the state for disposal.

Under the Act, each county is expected to prepare and implement a twenty year Solid Waste Management Plan which is to be updated every five years, Mich. Comp. Laws Ann. § 299.425. An advisory Planning Committee is appointed to assist in the preparation of the plan which then must be approved by the County Board of Commissioners and 67% of the municipalities within the county, Mich. Comp. Laws Ann. §§ 299.426, 299.428. Finally, the Director of the Department of Natural Resources must approve the plan which then becomes part of the State's Solid Waste Management Plan, Mich. Comp. Laws Ann. §§ 299.429, 299.432.

Petitioner submitted an application to the Respondent Solid Waste Planning Committee which was in the process of preparing a draft of the Five-Year Solid Waste Management Plan Update required under the Act, asking that it be allowed to receive 1750 tons of out-of-state generated waste daily. The Planning Committee denied that request. Under the Solid Waste Management Act, the action of the Committee is advisory only, Mich. Comp. Laws Ann. §§ 299.426, 299.427. Neither the County Boar of Commissioners which must adopt the final plan nor St. Clair County, the planning agency under the Act, Mich. Comp. Laws Ann. § 299.425, were made parties to this lawsuit. The Director of the Department of Natural Resources ultimately must approve the plan before it takes effect as part of the overall state-wide solid waste management plan, Mich. Comp. Laws Ann. § 299.429.

The case was decided in Respondent's favor by the United States District Court for the Eastern District of

Michigan, Southern Division, by order entered on March 2, 1990, on Petitioner's Motion for Summary Judgment, *Bill Kettlewell Excavating, Inc.* v *Michigan Department of Natural Resources*, 732 F.Supp. 761 (E.D. Mich., 1990). The Court held that the Michigan Solid Waste Management Act clearly did not discriminate against interstate commerce on its face and, as for the claim of discrimination in practical effect, found that the Petitioner had not even alleged that the Director of the DNR had used his authority to reject plans which allowed the importation of out-of-state waste. Finding only an incidental effect on interstate commerce and based on the Act's putative benefits which "include the provision of a comprehensive plan for waste disposal, through which appropriate planning for such disposal can result, as well as the protection of the public's health, safety, and welfare," 732 F.Supp. at 765, the Court found that there was no violation of the Commerce Clause.

The Court of Appeals affirmed as set forth in Petitioner's Statement of the case.

Although Petitioner speculates in its Brief that there is excess capacity at its landfill site, that is a misstatement of fact. Where Petitioner claims to have capacity to meet all the county's disposal needs for twenty years and still have capacity sufficient to accept 1750 tons of imported solid waste per day, that is not true. In reality, it is believed that there is less than the twenty year capacity Petitioner claims to have available for the reception of St. Clair County waste, much less an amount in excess of that twenty year period available for imported waste.

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REASONS FOR DENYING THE WRIT

I.

THE PROVISIONS OF THE MICHIGAN SOLID WASTE MANAGEMENT ACT DO NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE EITHER ON THEIR FACE OR IN PRACTICAL EFFECT AND THEREFORE, THE COURT BELOW PROPERLY FOUND THAT THE PUTATIVE BENEFITS OF THE STATUTES TO THE WELFARE OF THE STATE OUTWEIGHED THE INCIDENTAL EFFECT OF THE ACT ON INTERSTATE COMMERCE.

Petitioner has limited its appeal to whether two amendments to the Michigan Solid Waste Management Act, Mich. Comp. Laws Ann. §§ 299.401, et seq., on their face, illegally discriminate against interstate commerce in violation of the Commerce Clause. Yet the language of the amendments clearly does not discriminate "either on its face or in practical effect," *Hughes* v *Oklahoma*, 441 U.S. 322, 336 (1979), against interstate commerce. Contrary to Petitioner's claim, there is *no* prohibition in Michigan's Solid Waste Management Act against the importation and disposal of out-of-state waste. Rather, it merely requires that all waste to be disposed of in the state be planned for and included in the solid waste management plans of the individual counties. The complained-of amendments read:

> "A person shall not accept for disposal solid waste . . . that is not generated in the county in which the disposal area is located unless the acceptance of solid waste . . . that is not generated in the county is explicitly authorized in the approved county solid waste management plan." Mich. Comp. Laws Ann. § 299.413a.
>
> "In order for a disposal area to serve the disposal needs of another county, state, or country,

> the service . . . must be explicitly authorized in the approved solid waste management plan of the receiving county. With regard to intercounty service within Michigan, the service must also be explicitly authorized in the exporting county's solid waste management plan." Mich. Comp. Laws Ann. § 299.430(2).

All out-of-county generated waste to be disposed of in the county must be included in the solid waste management plan. Of course, the purpose of the plan is to provide for the disposal of in-county waste. It is important to note that a county's solid waste management plan does not stand alone but, upon acceptance by the Director of the Department of Natural Resources, becomes a part of an overall state-wide plan.

> "The state solid waste management plan shall consist of the state solid waste plan developed under the resource recovery act, Act No. 366 of the Public Acts of 1974, being sections 299.301 to 299.321 of the Michigan Compiled Laws, and *all county plans approved or developed by the director.*" Mich. Comp. Laws Ann. § 299.432(1), emphasis added.

It is in this context that the challenged amendments and the county plan must be reviewed in deciding whether in fact a violation of the commerce clause has occurred.

All parties agree that there are two basic tests which apply to dormant commerce clause cases, a strict scrutiny standard which applies when a statute is found "to discriminate against interstate commerce 'either on its face or in practical effect,'" *Maine* v *Taylor*, 477 U.S. 131, 138 (1986), and a less rigid, balancing approach when no per se discrimination against commerce is found.

> "In determining whether a State has overstepped its role in regulating interstate commerce, this Court has distinguished between state statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions. While statutes in the first group violate the Commerce Clause only if the burdens they impose on interstate trade are 'clearly excessive in relation to the putative local benefits,' *Pike* v *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), statutes in the second group are subject to more demanding scrutiny." *Maine*, 477 U.S. at 138.

The Courts below, after reviewing the amendments and their impact on interstate commerce, correctly applied the *Pike* v *Bruce Church* test in deciding that the Michigan Solid Waste Management Act clearly does not facially or in practical effect discriminate against interstate commerce.

To distinguish between this case where the state law on its face simply requires identification in the state plan before waste is imported and those cases where there was a prohibition which triggered the use of the strict scrutiny test of *Maine* v *Taylor*, one merely has to look at the underlying statutes involved. In *Hughes* v *Oklahoma*, the state flatly prohibited the export of natural minnows seined from state waters. "No person may transport or ship minnows for sale outside the state which were seined or procured within the waters of this state . . ." 441 U.S. at 323-324, n. 1. In *Philadelphia* v *New Jersey*, 437 U.S. 617 (1978), the importation and disposal of solid waste in New Jersey with a few limited exceptions was banned from the entire state.

> "No person shall bring into this State, any solid or liquid waste which originated or was col-

lected outside the territorial limits of this State." 437 U.S. at 618 (1978).

These types of statutes are not akin to the Michigan statute. These are clearly economic protectionist measures aimed at halting commerce between the states to the advantage of the local economy. The same type of prohibition was evident in *Maine* v *Taylor* where the importation of certain baitfish into Maine was prohibited. While facially dicriminating against interstate commerce, that ban was found to withstand the strict scrutiny test and was upheld.

Michigan's statute, on the other hand, is not an economic prohibition or a bar to interstate commerce. It is an attempt to regulate the disposal of all waste on a state-wide basis, an exercise of the state's legitimate police power function of rationally addressing a major environmental issue. In order to plan for future waste disposal, the sources and quantity of such waste must be identified. Such identification is not an economic protectionist measure. Disposal of out-of-state solid waste in Michigan is permitted but within the confines of the Solid Waste Management Act and the state plan. On its face, the Act even-handedly requires that all waste to be deposited in the state be accounted for. In effect, there is no prohibition. The amended act clearly is not unconstitutional "either on its face or in practical effect," *Maine* v *Taylor*, 477 U.S. at 138, and therefore, the balancing test of *Pike* applies.

That being the case, the public interest served by the Act must be reviewed to judge whether the lower courts erred in finding that there was a legitimate public purpose and that the benefits flowing from the Act outweigh the burden incidentally placed on interstate commerce. Under the Michigan Constitution, each statute is required to state its object in its title. Mich.

Const. art 4, § 24. The purpose of the Solid Waste Management Act is stated as follows:

> "AN ACT to protect the public health and the environment; to provide for the regulation and management of solid wastes . . ."

These are goals clearly within the police powers of the state to promote. The Act itself is an integrated and comprehensive approach to the entire solid waste disposal problem. This Court has recognized that environmental and public health concerns are legitimate issues for state action so long as their result is not discriminatory, see *Philadelphia*, 437 U.S. at 626. The Solid Waste Management Act impacts all levels of waste disposal: licensing and monitoring landfill sites and setting standards for the transportation of waste. Most importantly, however, it provides for the generation and implementation of the various county solid waste management plans and their eventual adoption as the overall state-wide plan.

Therefore, the St. Clair County Plan cannot be viewed in isolation but only as part of the comprehensive scope of the Act. Under the Act, the county's plan automatically becomes part of the state plan upon approval by the state. Mich. Comp. Laws Ann. § 299.432. The inquiry here cannot be limited to one county's plan for, until it is approved by the Director of the DNR thereby becoming part of the state's plan, a county's plan has no effect. The fact that one county bans the importation of waste is not relevant for, in reality, there is no independent county plan, only a subdivision of the state's plan. It is only on approval from the DNR that the county plan becomes effective and since such approval automatically makes the county's plan an element of the state's, it never has an independent life. Since the state plan has not been alleged to prohibit

the disposal of out-of-state waste, there is, in effect, no discrimination. Michigan is one marketplace and remains available as a depository of solid waste to interstate commerce. Both the interests of the state and the individual counties are protected by the Act but it is ultimately the state which approves the county plans, making them part of the overall plan.

> "The Legislature contemplated significant local input in the development of county plans. MCL 299.427; MSA 13.29(27) and MCL 299.428; MSA 13.29(28). However, once these plans are approved a cohesive scheme of centralized and uniform controls emerge." *Southeastern Oakland County Incinerator Authority v Avon Township*, 144 Mich. App. 39, 44; 372 N.W.2d 678 (1985), *lv. den.* 424 Mich. 891 (1986).

> "Our review reveals that the legislative objective was to foster comprehensive planning for the disposal of said waste at the local level and to integrate state licensing with those plans so that the disposal of waste within the planning area would be compatible with the local plan. Additionally, enactment of the statutory planning and licensing scheme reasonably relates to the purpose of correcting past planning and licensing inadequacies. By placing primary planning at the county level, the scheme provides for reasoned planning for disposal sites based in part on the county's projected capacities and waste generation rates. Each county is permitted to address local concerns and to adapt its plans to local conditions while at the same time safeguarding parochial decision-making by requiring the plan to be approved for inclusion in the state plan. The rules and the act provide

> a method whereby a county can develop a plan which is workable and will not be disrupted by future disposal of waste from sources not accounted for during the planning process." *Fort Gratiot Charter Township* v *Kettlewell*, 150 Mich. App. 648, 653-654; 389 N.W.2d 468 (1986).

By requiring planning for the next twenty years, the state assures sufficient capacity and also encourages alternate methods of waste treatment. However, the state has also recognized the unique interests of the counties in this planning.

> "As with hazardous wastes, the management and disposal of solid wastes is clearly an area which demands uniform statewide treatment. In holding that the Hazardous Waste Management Act preempted local regulation, we said:
>
> > "'The Legislature recognized that hazardous waste disposal areas evoke such strong emotions in localities that the decision as to where a landfill should go should not be given to the locality, which is far more swayed by parochial interests than the state. The Legislature, instead, gave the power to a centralized decision-maker who could act uniformly and provide the most effective means of regulating hazardous wastes.'" *Southeastern Oakland County Incinerator Authority*, 144 Mich. App. at 45 (citations omitted).

There is nothing in the Act which can be construed to have a protectionist purpose. No local economy is favored by being required to plan for the long-term disposal of its own waste. Rather, the state is forcing its counties to act responsibly while retaining ultimate

control to assure that local protectionist interests are kept in check. The very nature of landfills makes statewide planning imperative for no community, left on its own, would choose to place a landfill within its borders. If the Act did not have a provision that all waste must be identified in the local solid waste management plan before it is disposed of, the whole statutory scheme would be gutted. There would be no way of knowing how much waste would be imported into a landfill and therefore, its life span could not be estimated. Without identification of the amount of waste projected for disposal, there can be no planning.

It is for this reason that Petitioner's reliance on *Dean Milk Co.* v *City of Madison*, 340 U.S. 349 (1951), is misplaced. There, Madison passed an ordinance which required that any milk sold in the City be pasteurized within five miles of the central square and be produced within twenty-five miles. It involved a strictly economic protectionist measure *prohibiting* the sale of competitive products. There was no overall state regulatory scheme aimed at serving a legitimate public purpose in *Dean Milk*. There was only a blatantly parochial motive of protecting local milk producers. Although *Dean Milk* is not cited in the Sixth Circuit's opinion (hardly surprising since the case was not even raised by the Petitioner until its Reply Brief before that Court), it simply does not negate the lower courts' decisions.

There remains a fundamental difference between the cases. *Dean Milk* dealt with a clearly economic regulation. The ordinance in *Dean Milk* was in violation of the Commerce Clause both on its face and in its effect. There the ordinance:

> "in practical effect exclude[d] from distribution in Madison wholesome milk produced and pasteurized in Illinois. . . . In thus erecting an *eco-*

> *nomic barrier protecting a major local industry* against competition from without the State, Madison plainly discriminates against interstate commerce." 340 U.S. at 354 (citations omitted, emphasis added).

The Petitioner makes much of a one sentence footnote stating that "it is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce," *Dean Milk*, 340 U.S. at 354, n.4, but the fact is that *Dean Milk* itself is immaterial to the challenge to the Michigan amendments. The ordinance in *Dean Milk* was both facially and in its effect discriminatory. Therefore, the Court applied what proved to be the precursor of the *Maine* test, not the *Pike* balancing standard applicable here, and used a strict scrutiny test, examining first the legitimacy of the local purpose and then whether less discriminatory alternatives existed. The sole purpose was found to be pure economic protectionism. In addition, the Court found that nondiscriminatory alternatives existed.

But in this case, where Michigan's statute and the plan promulgated thereunder have neither facial invalidity nor a discriminatory effect, the proper test is a weighing of the incidental effects of the amendments on interstate commerce against the obvious state-wide benefits of solid waste planning for the future. Where the regulation in *Dean Milk* operated to prohibit the importation and sale of any milk not pasteurized within five miles of Madison, the amendments to the Solid Waste Management Act merely require that waste be identified in local plans in order to assure that long term needs for the disposal of in-state *and* out-of-state waste can be met. The effect of the amendments has not been to forbid the importation of solid waste into Michigan for Petitioner has not alleged that such

importation is not currently allowed. As the lower courts stated, "although ultimate authority for acceptance of a county's plan resides in a single official under MSWMA, Mich. Comp. Laws Ann. §§ 299.425 and 299.429, the plaintiff has not alleged that this official has used this authority to reject county plans proposing the importation of out-of-state waste." *Bill Kettlewell Excavating, Inc.* v *Michigan Department of Natural Resources*, 732 F.Supp. at 764; *Bill Kettlewell Excavating, Inc.* v *Michigan Department of Natural Resources*, 931 F.2d 413, 417 (6th Cir. 1991). That one county, under these amendments, chooses not to allow the disposal of out-of-state or out-of-county waste has a minor effect on interstate commerce. Each Michigan county is required under state law to manage and plan for waste disposal for the next twenty years whether this is provided by landfill space or other alternatives. This is clearly a necessary health measure within the power of the state to require. "For Commerce Clause purposes," the Supreme Court has "long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other." *Sporhase* v *Nebraska*, 458 U.S. 941, 956 (1982).

This is the real difference between the various cases cited by the Petitioner and the Michigan law, the nature of the regulation. Where all those laws and regulations blatantly shielded local industries from outside competition, the Michigan amendments are firmly rooted in protecting the health, safety and welfare of its citizens. *Polar Ice Cream & Creamery Co.* v *Andrews*, 375 U.S. 361 (1964), involved a price fixing scheme which required Polar not only to pay higher prices for Florida milk but to purchase milk in excess of its needs despite the ready availability of cheaper out-of-state milk. Milk could only be imported if local supplies were inadequate. Likewise, in *Brimmer* v *Rebman*, 138 U.S. 78

(1891), meat slaughtered more than one hundred miles from its place of sale in Virginia was required to be inspected at a fee of one cent per pound, a "heavy charge," 138 U.S. at 81, which would make competition with local meat impossible. It was the effect of the law which was decisive, not the fact that some in-state meat was also impacted. If the *Pike* test had been applied, the law would clearly have been facially defective. The "inspection fee" was nothing more than a tax in disguise. However, that is not the case in Michigan where there is no discriminatory effect.

Perhaps the most blatant of these cases is that of *Bacchus Imports, Ltd.* v *Dias, Director of Taxation of Hawaii*, 468 U.S. 263 (1984), where locally produced liquors were exempted from a 20% excise tax.

> "'The legislature's reason for exempting 'ti root okolehao' from the 'alcohol tax' was 'to *encourage and promote the establishment of a new industry*,' S.L.H. 1960, c. 26; Sen. Stand. Comm. Rep. No. 87 in 1960 Senate Journal at 224, and the exemption of 'fruit wine manufactured in the state from products grown in the State' was *intended 'to help' in stimulating 'the local fruit wine industry.'* S.L.H. 1976, c. 39; Sen. Stand. Comm. Rep. No. 408-76; in Senate Journal, at 1056." 468 U.S. at 270-271, quoting Hawaii Supreme Court (emphasis added).

All the cases cited by the Petitioner dealt with isolated protectionist regulations aimed directly at hoarding local resources and fostering local economies for the benefit of the individual community or state, not with an integrated state plan created under a federal mandate to address a national problem. In adopting Chapter 82, Solid Waste Disposal, of Title 42,

Congress made the following finding with respect to solid waste:

> "that while the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies, the problems of waste disposal as set forth above have become a matter national in scope and in concern and necessitate Federal action through financial and technical assistance and leadership in the development, demonstration, and application of new and improved methods and processes to reduce the amount of waste and unsalvageable materials and to provide for proper and economical solid waste disposal practices." 42 U.S.C. § 6901(a)(4).

Under the Federal law, state and regional solid waste plans are encouraged and, according to the guidelines for such plans, the *volume* of solid waste to be serviced must be included, 42 U.S.C. § 6942. Financial assistance is made available to states, counties, municipalities, and intermunicipal agencies which "shall include assistance for facility planning and feasibility studies, . . . surveys and analyses of market needs . . ." 42 U.S.C. § 6948(a)(2)(A). Planning inherently requires that the amount of the waste to be disposed of at a site be identified. Without such knowledge, all planning is futile. While it is not the intent here to claim that the Federal government has delegated its authority to the state and therefore, exempted these amendments and the Solid Waste Management Act itself from Commerce Clause scrutiny, it is important to recognize that the state's efforts are important on a national as well as a local basis.

The offending statute in *Philadelphia* v *New Jersey*, banning the importation of any waste for disposal in

New Jersey's landfills, was adopted in 1974, two years before the passage of the federal Solid Waste Management Act, 42 U.S.C. § 6901 *et seq.* In fact, one of the first questions resolved by the Court in its review of the case was whether the later federal act had preempted the New Jersey law. Obviously, if passed two years prior to the federal act, there could be no compliance with the federal guidelines for acceptable solid waste management plans. Rather, the New Jersey Act was an ill-contrived, blatantly protectionist measure established specifically to ban the importation of solid waste, not a plan adopted to provide for its long term disposal and management on a state-wide basis. The fact that New Jersey attempted to justify its ban by claiming environmental concerns could not hide its discriminatory effect.

Michigan is in fact planning for the flow of all waste into its landfills. In *Philadelphia*, the Court specifically pointed out that New Jersey, in its attempts to protect its environment, could not discriminate against out-of-state waste, however, "it may be assumed as well that New Jersey may pursue those ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected." 437 U.S. at 626 (emphasis Court's). This is precisely what Michigan is trying to accomplish.

Although landfill capacity is limited, it is not a natural resource. It is a necessary land use, albeit an unpopular one, a man-made depository for man-made waste. Recognizing the dislike and fear which landfills inspire on a local basis, the so-called "not in my backyard" or "NIMBY" syndrome, Michigan acted to force responsibility onto the counties. It is only when local governments are forced to actually face the problem and address their own needs that alternate solutions to

the solid waste problem will emerge. Therefore, unlike other land uses, the siting of landfills was specifically removed from the control of local zoning and their creation was mandated by the state in order to assure that there are sufficient disposal methods for the future. It is the intent of the state that the need for all landfills eventually be eliminated, however, that can only occur if the state is allowed to plan today.

Therefore, under the Michigan Act, solid waste management plans are not merely concerned with landfill capacity and its use in the disposal of solid waste. Rather, each plan is required to explore alternate methods of disposal including recycling and composting prior to its acceptance by the Department of Natural Resources.

> "The director shall not approve a plan update unless:
>
> "(a) The plan contains an analysis or evaluation of the best available information applicable to the plan area in regard to recyclable materials and all of the following:
>
> "(i) The kind and volume of material in the plan area's waste stream that may be recycled or composted.
>
> "(ii) How various factors do or may affect a recycling and composting program in the plan area. Factors shall include an evaluation of the existing solid waste collection system; materials market; transportation networks; local composting and recycling support groups, or both; institutional arrangements; the population in the plan area; and other pertinent factors.

"(iii) An identification of impediments to implementing a recycling and composting program and recommended strategies for removing or minimizing impediments.

"(iv) How recycling and composting and other processing or disposal methods could complement each other and an examination of the feasibility of excluding site separated material and source separated material from other processing or disposal methods.

"(v) Identification and quantification of environmental, economic, and other benefits that could result from the implementation of a recycling and composting program." Mich. Comp. Laws Ann. § 299.430a.

By requiring each county to provide such alternate methods of disposal, Michigan is, in fact, "slowing the flow of all waste into the State's remaining landfills." Although the Court of Appeals raised the question in discussing *Philadelphia* of "whether 'slowing the flow' is equivalent to stopping entirely the flow of solid waste," *Bill Kettlewell Excavating*, 931 F.2d at 417 (1991), that hardly seems to be a logical reading. It is not reasonable to suggest that only by completely ignoring solid waste planning and requiring the export of all in-state generated waste can the commerce clause be satisfied. Rather, if a state and its counties act to reduce the flow of waste into its landfills with the ultimate goal of eliminating such method of disposal by way of long term planning including recycling, incineration and composting, it has responsibly slowed the flow of waste. However to do so, it must also be allowed to

plan for the disposal of all waste which will be disposed of in-state, including that entering its borders from without.

The Act clearly mandates the reduction of landfill use in the near future.

> "The director shall develop a strategy to encourage resource recovery and establishment of waste-to-energy facilities. . . . The report shall recommend public and private sector incentives and suggest potential regulatory relief to remove constraints on the siting of waste-to-energy and resource recovery facilities. The strategy and report shall be prepared with the goal of reducing land disposal to unusable residuals by the year 2005." Mich. Comp. Laws Ann. § 299.432(4).

The goal is to reduce the flow of all solid waste into Michigan's landfills. The emphasis on responsible planning is evident throughout the Act. In fact, a heavier burden is placed upon waste which is to be disposed of in a Michigan county which was generated in-state but outside the county for it is required that, in such a case, provision for the disposal of such waste must be included in *both* plans. That is not true of out-of-state waste to be disposed of in Michigan. "The existence of major in-state interests adversely affected by the Act is a powerful safeguard against legislative abuse." *Minnesota* v *Clover Leaf Creamery Company*, 449 U.S. 456, 473, n.17 (1981).

By burdening other counties in Michigan with greater restrictions than those which apply to out-of-state waste, both the fairness and the legitimate environmental purpose of the Act are evidenced.

> "Obviously, a State that imposes severe withdrawal and use restrictions on its own citizens

> is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State. An exemption for interstate transfers would be inconsistent with the ideal of evenhandedness in regulation." *Sporhase*, 458 U.S. at 955-956.

Likewise, to exempt out-of-state waste from inclusion in the state-wide plan, forcing Michigan to behave responsibly toward waste created therein but allowing other states to import with no similar restriction, would be unfair and prejudicial.

It is clear under the various interstate commerce clause cases that Michigan cannot impose a requirement that other states pursue recycling, incineration or other alternate means of disposal in order to slow the flow of waste into its landfills. Regulations requiring reciprocity are facially discriminatory and fail the strict scrutiny test of *Maine* v *Taylor*, *Sporhase*, 458 U.S. at 958. Therefore, there is no suggestion in the amendments of the reciprocity requirement which was key in the Court's decision in *New Energy Company of Indiana* v *Limbach*, 486 U.S. 269 (1988), cited by Petitioner where, in order to take advantage of a tax credit in Ohio, ethanol produced outside the state had to come from a state that granted a similar advantage to Ohio manufactured ethanol. Since Michigan cannot slow the flow from other states by requiring them to recycle or compost and obviously cannot bar out-of-state waste, it must, at the very least, be allowed to identify incoming waste in order to deal with it properly. The effect of the amendments on out-of-state waste is minimal, but the difference to Michigan immense. Without identifying waste for importation, all efforts to responsibly address the state-wide problem of long-term solid waste disposal are just a waste of time.

There was no error made by the Courts below nor do their opinions conflict with any precedent of this Court's despite Petitioner's attempts to create a conflict. The Michigan statute is distinguishable from the various cases cited by Petitioner for it only incidentally impacts interstate commerce and that impact is not merely for the economic protection of local resources or industry but rather is the by-product of an overall plan for the long term treatment of waste, a federally favored goal. The Courts below did not err. Certiorari should not be granted.

II.

THERE IS NO CONFLICT BETWEEN THE REASONING BELOW AND THAT OF *PHILADELPHIA* v *NEW JERSEY*. THE REASONING OF THE COURT BELOW AND THE OTHER CIRCUITS ARE LOGICAL AND RATIONAL EXTENSIONS OF THE RULE SET FORTH IN *PHILADELPHIA*.

Petitioner would have this Court review the decision of the Sixth Circuit in this case, not because there is a conflict between the Circuits, but rather because there is accord among the lower courts. This hardly seems an appropriate reason for granting Certiorari. Three Courts of Appeals, the Eleventh in *Diamond Waste, Inc.* v *Monroe County, Georgia*, 939 F.2d 941 (11th Cir. 1991), the Ninth in *Evergreen Waste Systems, Inc.* v *Metropolitan Service District*, 820 F.2d 1482 (9th Cir. 1987), and the Sixth in this case, have found that, under certain circumstances, it is permissible to limit the importation of solid waste into areas of a state. These cases do not conflict with the *Philadelphia* decision which found a state-wide protectionist ban to be unconstitutional, but rather they clarify and complement that decision.

While Petitioner argues that the lower courts have abandoned *Philadelphia* v *New Jersey*, that is not the case. Rather, they have logically extended the doctrine adopted by this Court therein that an outright, patent ban on the importation of waste over state borders is not permitted, but orderly planning which may include the restriction of disposal of out-of-state waste in some areas of a state is permissible. This court recognized that the goals of the New Jersey legislation were acceptable, if not laudable, but that the means used to accomplish that end were not. However, it also made it clear that other means would be acceptable for New Jersey clearly had the option of slowing the flow of all waste into its landfills, *Philadelphia*, 437 U.S. at 626.

As shown above, Michigan's Solid Waste Management Act requires that all county plans include provisions for the reduction of the waste stream into landfills. Likewise, in *Evergreen Waste Systems, Inc.* v *Metropolitan Service District*, 820 F.2d 1482 (9th Cir. 1987), "[t]he ban accompanied other measures designed to restrict the flow of waste going into the landfill and thus extend its useful life." 820 F.2d at 1483.

In *Diamond Waste, Inc.* v *Monroe County, Georgia*, 939 F.2d 941 (11th Cir. 1991), a state statute required prior permission for the disposal of out-of-state or out-of-county waste.

> "No person, firm, corporation, or employee of any municipality shall transport, pursuant to a contract, whether oral or otherwise, garbage, trash, waste, or refuse across state or county boundaries for the purpose of dumping the same at a publicly or privately owned dump, unless permission is first obtained from the governing authority of the county in which the dump is located and from the governing

> authority of the county in which the garbage, trash, waste, or refuse is collected." 939 F.2d at 943, n.1.

The county placed a ban on the importation of all waste as part of a local dispute with a city in its jurisdiction. Although the Court struck down the local resolution, it held that the statute was constitutional. It also held that, in other circumstances, the county ban might also have been upheld.

This Court has acknowledged that solid waste planning for the protection of the environment is a legitimate local purpose, *Philadelphia*, 437 U.S. at 626. Further, based on the acknowledged need for such planning as mandated by federal law, including the need to anticipate volume and capacity, it seems to be a minimal requirement that waste be identified before it is brought into a state. It seems unlikely that there are any means which are as nondiscriminatory and available by which a state could accomplish this goal than Michigan's limited requirement that waste be identified in the Solid Waste Management Plan prior to its disposal in the state. Michigan does not, either by law or by action, bar the importation of solid waste.

CONCLUSION

The basic premise of the Petitioner's argument is flawed. The cases below do not overturn *Philadelphia* nor do they threaten to do so. They merely build on its principles and concepts in light of the ever-increasing need for environmentally sound planning and efficient waste disposal. Congress has long acknowledged the need for solid waste planning but, if a state can only plan for in-state needs and must allow the unrestrained importation of out-of-state waste, the entire federal

scheme delegating planning to states and local authorities is worthless. States must experiment with different methods of planning for all waste disposal. Despite Petitioner's arguments to the contrary, planning is not the same as banning.

A writ of certiorari should not be granted.

Respectfully submitted,

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DATED: December 5, 1991

APPENDIX TO BRIEF IN OPPOSITION

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

MICHIGAN CONSTITUTION 1963, ART 4, § 24

§ 24. Laws; object, title, amendments changing purpose

Sec. 24. No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title.

MICH. COMP. LAWS ANN. § 299.413a

299.413a. Acceptance of waste or ash generated outside county of disposal area

Sec. 13a. A person shall not accept for disposal solid waste or municipal solid waste incinerator ash that is not generated in the county in which the disposal area is located unless the acceptance of solid waste or municipal solid waste incinerator ash that is not generated in the county is explicitly authorized in the approved county solid waste management plan. The department shall take action to enforce this section within 30 days of obtaining knowledge of a violation of this section.

MICH. COMP. LAWS ANN. § 299.425

299.425. Solid waste management plans

Sec. 25. (1) Each solid waste management plan shall include an enforceable program and process to assure that the nonhazardous solid waste gener-

ated or to be generated in the planning area for a 20-year period is collected and recovered, processed, or disposed of at disposal areas which comply with state law and rules promulgated by the department governing location, design, and operation of the disposal areas.

(2) An initial solid waste management plan shall be prepared and approved under this section and shall be submitted to the director not later than January 5, 1984. The initial plan shall be prepared for a 20-year period and shall be reviewed and updated every 5 years. An updated plan and an amendment to a plan shall be prepared and approved as provided in sections 25, 26, 27, 28, and 29.[1] The solid waste management plan shall encompass all municipalities within the county. The plan shall at a minimum comply with the requirements of section 30.[2] The solid waste management plan shall take into consideration solid waste management plans in contiguous counties and existing local approved solid waste management plans as they relate to the county's needs. At a minimum, a county preparing a solid waste management plan shall consult with the regional planning agency from the beginning to the completion of the plan.

(3) Not later than July 1, 1981, each county shall file with the director and with each municipality within the county on a form provided by the director, a notice of intent, indicating the county's intent to prepare a county solid waste management plan or to upgrade an existing plan. The notice shall identify the designated agency

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1 [*Printer's Note*]: **All footnotes omitted in this reproduction.**

which shall be responsible for preparing the county plan.

(4) If the county fails to file a notice of intent with the director within the prescribed time, the director immediately shall notify each municipality within the county and shall request those municipalities to prepare the county solid waste management plan and shall convene a meeting to discuss the plan preparation. Within 4 months following notification by the director, the municipalities shall decide by a majority vote of the municipalities in the county whether or not to file a notice of intent to prepare the county solid waste management plan. Each municipality in the county shall have 1 vote. If a majority does not agree, then a notice of intent shall not be filed. The notice shall identify the designated agency which shall be responsible for preparing the county plan.

(5) If the municipalities fail to file a notice of intent to prepare a county solid waste management plan with the director within the prescribed time, the director shall request the appropriate regional solid waste management planning agency to prepare the county solid waste management plan. The regional solid waste management planning agency shall respond within 90 days after the date of the request.

(6) If the regional solid waste management planning agency declines to prepare a county plan, the director shall prepare the plan for the county and that plan shall be final.

(7) A solid waste management planning agency, upon request of the director, shall submit a progress report in preparing its solid waste management plan.

MICH. COMP. LAWS ANN. § 299.426

299.426. Planning committees for plan preparations

Sec. 26. (1) The county executive of a charter county that elects a county executive and that chooses to prepare a solid waste management plan under section 25[1] or the county board of commissioners in all other counties choosing to prepare an initial 20-year solid waste management plan under section 25, or the municipalities preparing an initial 20-year plan under section 25(4),[2] shall appoint a planning committee to assist the agency designated to prepare the plan under section 25. If the county charter provides procedures for approval by the county board of commissioners of appointments by the county executive, an appointment under this subsection shall be subject to that approval. A planning committee appointed pursuant to this subsection shall be appointed for terms of 2 years. A planning committee appointed pursuant to this subsection may be reappointed for the purpose of completing the preparation of the initial plan or overseeing the implementation of the initial plan. Reappointed members of a planning committee shall serve for terms not to exceed 2 years as determined by the appointing authority. An initial 20-year solid waste management plan shall only be approved by a majority of the members appointed and serving.

(2) A planning committee appointed pursuant to this section shall consist of 14 members. Of the members appointed, 4 shall represent the solid waste management industry, 2 shall represent environmental interest groups, 1 shall represent county government, 1 shall represent city government, 1 shall represent township government, 1 shall rep-

resent the regional solid waste planning agency, 1 shall represent industrial waste generators, and 3 shall represent the general public. A member appointed to represent a county, city, or township government shall be an elected official of that government or the designee of that elected official. Vacancies shall be filled in the same manner as the original appointments. A member may be removed for nonperformance of duty.

(3) A planning committee appointed pursuant to this section shall annually elect a chairperson and shall establish procedures for conducting the committee's activities and for reviewing the matters to be considered by the committee.

MICH. COMP. LAWS ANN. § 299.427

299.427. Procedure for preparation of plan

Sec. 27. A county or regional solid waste management planning agency preparing a solid waste management plan shall:

(a) Solicit the advice and consult periodically during the preparation of the plan with the municipalities, appropriate organizations, and the private sector in the county under section 30(1)[1] and solicit the advice and consult with the appropriate county or regional solid waste management planning agency, and adjacent counties and municipalities in adjacent counties which may be significantly affected by the solid waste management plan for a county.

(b) If a planning committee has been appointed under section 26,[2] prepare the plan with the advice, consultation, and assistance of the planning committee.

(c) Notify, by letter, the chief elected official of each municipality and any other person so requesting within the county, not less than 10 days before each public meeting of the planning agency designated by the county, if that planning agency plans to discuss the county plan. The letter shall indicate as precisely as possible the subject matter being discussed.

(d) Submit for review a copy of the proposed county or regional solid waste management plan to the director, to each municipality within the affected county, and to adjacent counties and municipalities that may be affected by the plan or which have requested the opportunity to review the plan. The county plan shall be submitted for review to the designated regional solid waste management planning agency for that county. Reviewing agencies shall be allowed an opportunity of not less than 3 months to review and comment on the plan before adoption of the plan by the county or a designated regional solid waste management planning agency. The comments of a reviewing agency shall be submitted with the plan to the county board of commissioners or to the regional solid waste management planning agency.

(e) Publish a notice, at the time the plan is submitted for review under subdivision (d), of the availability of the plan for inspection or copying, at cost, by an interested person.

(f) Conduct a public hearing on the proposed county solid waste management plan before formal adoption. A notice shall be published not less than 30 days before a hearing, in a paper having a major circulation within the county.

The notice shall indicate a location where copies of the plan are available for public inspection and the time and place of the public hearing.

MICH. COMP. LAWS ANN. § 299.428

299.428. Inclusion in adjacent county's plan

Sec. 28. (1) A municipality located in 2 counties or adjacent to a municipality located in another county may request to be included in the adjacent county's plan. The request shall be approved by a resolution of each county board of commissioners of the counties involved before the municipality may be included. A municipality may appeal a decision not to be included in an adjacent county's plan to the director. If there is an appeal, the director shall issue a decision within 45 days. The decision of the director shall be final.

(2) Except as provided in subsection (3), the county board of commissioners shall formally act on the plan following the public hearing required by section 27(f).[1]

(3) If a planning committee has been appointed by the county board of commissioners under section 26(1),[2] the county board of commissioners, or if a plan is prepared under section 25(4),[3] the municipalities in the county who voted in favor of filing a notice of intent to prepare a county solid waste management plan, shall take formal action on the plan after the completion of public hearings and only after the plan has been approved by a majority of the planning committee as provided in section 26(1). If the county board of commissioners, or if a plan is prepared under

section 25(4), a majority of the municipalities in the county who voted in favor of filing a notice of intent to prepare a county solid waste management plan, does not approve the plan as submitted, the plan shall be returned to the planning committee along with a statement of objections, to the plan. Within 30 days after receipt, the planning committee shall review the objections and shall return the plan with its recommendations.

(4) Following approval the county plan shall be approved by the governing bodies of not less than 67% of the municipalities within each respective county before the plan may take effect.

(5) A county plan prepared by a regional solid waste management planning agency shall be approved by the governing bodies of not less than 67% of the municipalities within each respective county before the plan may take effect.

(6) If, after the plan has been adopted, the governing bodies of not less than 67% of the municipalities have not approved the plan, the director shall prepare a plan for the county, including those municipalities that did not approve the county plan. A plan prepared by the director shall be final.

MICH. COMP. LAWS ANN. § 299.429

299.429. Approval, disapproval, and review of plans; minimum requirements for plans

Sec. 29. (1) The director shall, within 6 months after a plan has been submitted for approval, approve or disapprove the plan. An approved plan shall

at a minimum meet the requirements set forth in section 30(1).[1]

(2) The director shall review an approved plan periodically and determine if revisions or corrections are necessary to bring the plan into compliance with this act. The director may, after notice and opportunity for a public hearing, held pursuant to Public Act No. 306 of the Public Acts of 1969, as amended,[2] withdraw approval of the plan. If the director withdraws approval of a county plan, the director shall establish a timetable or schedule for compliance with this act.

MICH. COMP. LAWS ANN. § 299.430

299.430. Promulgation of plan rules; out-of-county waste; compliance and conflicts with plan

Sec. 30. (1) Not later than September 11, 1979, the director shall promulgate rules for the development, form, and submission of initial solid waste management plans. The rules shall require all of the following:

(a) The establishment of goals and objectives for prevention of adverse effects on the public health and on the environment resulting from improper solid waste collection, processing, or disposal including protection of surface and groundwater quality, air quality, and the land.

(b) An evaluation of waste problems by type and volume, including residential and commercial solid waste, hazardous waste, industrial sludges, pretreatment residues, municipal sewage sludge, air pollution con-

trol residue, and other wastes from industrial or municipal sources.

(c) An evaluation and selection of technically and economically feasible solid waste management options, which may include sanitary landfill, resource recovery systems, resource conservation, or a combination of options.

(d) An inventory and description of all existing facilities where solid waste is being treated, processed, or disposed of, including a summary of the deficiencies, if any, of the facilities in meeting current solid waste management needs.

(e) The encouragement and documentation as part of the plan, of all opportunities for participation and involvement of the public, all affected agencies and parties, and the private sector.

(f) That the plan contain enforceable mechanisms for implementing the plan, including identification of the municipalities within the county responsible for the enforcement. This subdivision does not preclude the private sector's participation in providing solid waste management services consistent with the county plan.

(g) Current and projected population densities of each county and identification of population centers and centers of solid waste generation, including industrial wastes.

(h) That the plan area has, and will have during the plan period, access to a sufficient amount of available and suitable land, acces-

sible to transportation media, to accommodate the development and operation of solid waste disposal areas, or resource recovery facilities provided for in the plan.

(i) That the solid waste disposal areas or resource recovery facilities provided for in the plan are capable of being developed and operated in compliance with state law and rules of the department pertaining to protection of the public health and the environment, considering the available land in the plan area, and the technical feasibility of, and economic costs associated with, the facilities.

(j) A timetable or schedule for implementing the county solid waste management plan.

(2) In order for a disposal area to serve the disposal needs of another county, state, or country, the service, including the disposal of municipal solid waste incinerator ash, must be explicitly authorized in the approved solid waste management plan of the receiving county. With regard to intercounty service within Michigan, the service must also be explicitly authorized in the exporting county's solid waste management plan.

(3) A person shall not dispose of, store, or transport solid waste in this state unless the person complies with the requirements of this act.

(4) Following approval by the director of a county solid waste management plan and after July 1, 1981, an ordinance, law, rule, regulation, policy, or practice of a municipality, county, or governmental authority created by statute, which prohibits or regulates the location or development

of a solid waste disposal area, and which is not part of or not consistent with the approved solid waste management plan for the county, shall be considered in conflict with this act and shall not be enforceable.

MICH. COMP. LAWS ANN. § 299.430a

299.430a. Approval of plan update; requirements; rules

Sec. 30a. (1) The director shall not approve a plan update unless:

(a) The plan contains an analysis or evaluation of the best available information applicable to the plan area in regard to recyclable materials and all of the following:

(*i*) The kind and volume of material in the plan area's waste stream that may be recycled or composted.

(*ii*) How various factors do or may affect a recycling and composting program in the plan area. Factors shall include an evaluation of the existing solid waste collection system; materials market, transportation networks, local composting and recycling support groups, or both; institutional arrangements; the population in the plan area; and other pertinent factors.

(*iii*) An identification of impediments to implementing a recycling and composting program and recommended strategies for removing or minimizing impediments.

(*iv*) How recycling and composting and other processing or disposal methods could complement each other and an examination of the feasibility of excluding site separated material and source separated material from other processing or disposal methods.

(*v*) Identification and quantification of environmental, economic, and other benefits that could result from the implementation of a recycling and composting program.

(*vi*) The feasibility of source separation of materials that contain potentially hazardous components at disposal areas. This subparagraph applies only to plan updates that are due after January 31, 1989.

(b) The plan either provides for recycling and composting recyclable materials from the plan area's waste stream or establishes that recycling and composting is not necessary or feasible or is only necessary or feasible to a limited extent.

(c) A plan that proposes a recycling or composting program, or both, details the major features of that program, including all of the following:

(*i*) The kinds and volumes of recyclable materials that will be recycled or composted.

(*ii*) Collection methods.

(*iii*) Measures that will ensure collection

such as ordinances or cooperative arrangements, or both.

(*iv*) Ordinances or regulations affecting the program.

(*v*) The role of counties and municipalities in implementing the plan.

(*vi*) The involvement of existing recycling interests, solid waste haulers, and the community.

(*vii*) Anticipated costs.

(*viii*) On-going program financing.

(*ix*) Equipment selection.

(*x*) Public and private sector involvement.

(*xi*) Site availability and selection.

(*xii*) Operating parameters such as PH and heat range.

(2) The director may promulgate rules as may be necessary to implement this section.

MICH. COMP. LAWS ANN. § 299.432

299.432. State plan, contents; county plans; studies; reports

Sec. 32. (1) The state solid waste management plan shall consist of the state solid waste plan developed under the resource recovery act, Act No. 366 of the Public Acts of 1974, being sections 299.301 to 299.321 of the Michigan Compiled Laws, and all county plans approved or prepared by the director.

(2) The director shall consult and assist in the preparation and implementation of the county solid waste management plans.

(3) The director may undertake or contract for studies or reports necessary or useful in the preparation of the state solid waste management plan.

(4) The director shall develop a strategy to encourage resource recovery and establishment of waste-to-energy facilities. Within 1 year of the effective date of the amendatory act that added this subsection, the director shall submit to the legislature a report on the details of the strategy. The report shall recommend public and private sector incentives and suggest potential regulatory relief to remove constraints on the siting of waste-to-energy and resource recovery facilities. The strategy and report shall be prepared with the goal of reducing land disposal to unusable residuals by the year 2005. The report shall include specific recommendations for necessary legislation to implement the strategy.